Office - Supreme Court, U.S.
FILED
DEC 1 1982
ALEXANDER L. STEVAS
CLERK

No. 82-252

In the Supreme Court of the United States

OCTOBER TERM, 1982

DOMINICK PHILIP DEBENEDICTIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

VICTOR D. STONE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the trial court gave petitioner an adequate opportunity to present evidence at a mid-trial voluntariness hearing.

2. Whether a new trial is required because the trial court deferred ruling on petitioner's motion for a judgment of acquittal made at the close of the government's case and allowed the government to reopen its case.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 2

Conclusion 7

TABLE OF AUTHORITIES

Cases:

Rhode Island v. *Innis*, 446 U.S. 291 3

United States v. *Austin*, 462 F. 2d 724, cert. denied, 409 U.S. 1048 5

United States v. *Conway*, 632 F. 2d 641 5

United States v. *Cordero*, 668 F. 2d 32 5

United States v. *Dossey*, 558 F. 2d 1336 6

United States v. *Dreitzler*, 577 F. 2d 539, cert. denied, 440 U.S. 921 5

United States v. *Hinderman*, 625 F. 2d 994 5

United States v. *McDonough*, 603 F. 2d 19 5

United States v. *Powers*, 572 F. 2d 146 ..... 5, 6

United States v. *Sisack*, 527 F. 2d 917 5

United States v. *Vahalik*, 606 F. 2d 99, cert. denied, 444 U.S. 1081 6

Page

Statute and rules:

18 U.S.C. 1542 1

Fed. R. Crim. P.:

Rule 12(b)(3) 3
Rule 29(a) 4

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-252

DOMINICK PHILIP DEBENEDICTIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) and order amending that opinion (Pet. App. C) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1982 (Pet. App. B). A petition for rehearing was denied on April 30, 1982 (Pet. App. C). The petition for a writ of certiorari was filed on June 29, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of knowingly making a false statement in a passport application, in violation of 18 U.S.C. 1542. He was sentenced to five years' imprisonment, with four and one-half years suspended, and was placed on probation for three years. He was also fined $[illegible],000. The court of appeals affirmed (Pet. Apps. A and C).

The evidence at trial showed that on January 16, 1980, petitioner appeared before a deputy court clerk in Phoenix, Arizona, and filed an application for a passport in the name of a person who had died in infancy 50 years earlier. Petitioner presented in support of the application his own photograph and a copy of the dead infant's birth certificate, which he had obtained earlier (Tr. 27-39). Petitioner had also secured in the dead infant's name an identification card issued by the Arizona Department of Motor Vehicles. Such an identification card was customarily required to be shown to the clerk by a passport applicant (Tr. 153). After completing the application, petitioner swore to the truth of its contents (Tr. 155).

Thereafter, the State Department referred the application to the FBI for investigation (Tr. 27-28). On March 21, 1981, two FBI agents located petitioner outside the home of his estranged wife. After petitioner identified his photograph on the Arizona Department of Motor Vehicles identification card, one agent arrested him (Tr. 50). Advised by the other agent of his rights to remain silent and to counsel, petitioner stated that he did not wish to waive his rights (Tr. 65). The agent did not question him. As petitioner was being transported to jail, however, he remarked (Tr. 66-67): "I didn't even get the passport. How can I be charged with a passport violation?" One agent responded that petitioner was charged with making a false statement on the passport application. Several minutes later, petitioner said (Tr. 67): "[T]he mess I get myself into for trying to help a friend."

ARGUMENT

Petitioner contends that certain procedural rulings by the district court, none of which he challenged in a timely fashion at trial, require reversal.

1. Petitioner did not file a pretrial motion challenging the admissibility of the statements uttered to the agents

after his arrest. At trial, however, petitioner interposed an objection when one of the arresting agents was about to testify about the statements. The court excused the jury and conducted a hearing at which the agent related the events surrounding the utterances and was cross-examined by defense counsel (Tr. 46-75). The court then indicated its view that the statements were admissible because they were freely volunteered without any prompting on the part of law enforcement officers (Tr. 75-76). After a luncheon recess, the court inquired of counsel if they had "[a]nything further" (Tr. 76), and both counsel presented legal arguments on the voluntariness question. Defense counsel then moved for a mistrial based on the court's ruling, alleging that the statements were inadmissible because involuntarily made. After denying the motion (Tr. 81), the court summoned the jury, and, without further objection, the witness disclosed petitioner's utterances to the jury (Tr. 88).

Petitioner nonetheless contends (Pet. 6-12) that he was not accorded a voluntariness hearing, alleging that he was not given the opportunity to present evidence of his own out of the jury's presence. This contention is plainly belied by the record, which shows not only that a voluntariness hearing was conducted, but also that, despite the untimely manner in which it was raised (Fed. R. Crim. P. 12(b)(3)), the court considered the issue of admissibility of the statements from the standpoint of a waiver of *Miranda* rights as well as from the perspective of the absence of any subtle coercion (see Pet. 11-12). Cf. *Rhode Island* v. *Innis*, 446 U.S. 291 (1980). At no time did petitioner indicate that he desired to testify at the hearing, nor did he indicate that he had any other evidence to present before—or even after—the court's ruling and the presentation of the testimony to the jury. The court of appeals correctly held that the district court had held a voluntariness hearing and that petitioner, by never indicating any desire to put on evidence or raising any objection, had waived any objection to the procedure followed by the district court (Pet. App. B, 2-3).

2. Petitioner also contends (Pet. 13-23) that the trial court erred in failing to rule on his motion for a judgment of acquittal immediately after the government had completed its case and instead allowing the government to reopen its case for the purpose of eliciting an in-court identification of petitioner as the individual who committed the offense charged. At the close of the government's evidence, petitioner moved for a judgment of acquittal, pursuant to Fed. R. Crim. P. 29(a), on the ground that there was insufficient evidence identifying him as the passport applicant (Tr. 240-241). The court responded to the oral motion by remarking that it would be taken under advisement (Tr. 241-242). Defense counsel then announced in the jury's presence that he would not produce any evidence on behalf of petitioner (Tr. 243). The court excused the jury for the purpose of conducting a charge conference in chambers.

When the court reconvened, government counsel requested leave to reopen the prosecution's case for the purpose of securing an in-court identification of petitioner from an FBI agent who had testified earlier to having investigated the offense and to having overheard the incriminating admissions uttered by petitioner. Over the objection of defense counsel, the court permitted the prosecution to reopen its case for this limited purpose (Tr. 244-245). The agent was summoned to the witness stand and made his identification, and defense counsel elected not to cross-examine him (Tr. 245-246). The parties then proceeded with closing argument. Defense counsel made no further objection to the procedure, nor did he request an opportunity to present any evidence of his own or renew his motion for an acquittal.

Petitioner contends that the court had a duty to rule on his motion for acquittal when it was made and that it erred when deciding to defer such a ruling. This contention was correctly rejected by the court of appeals. As the court

noted (Pet. App. B, 4), petitioner was entitled to a ruling on his motion made at the close of the government's case before being required to proceed with his own case. This is to avoid placing him in the position of supplying a missing element of the offense in the presentation of his own case. As the court of appeals explained (Pet. App. C, 3), however, the trial court's action in taking the motion under advisement "merely had the effect of postponing a ruling on the motion until after the government had reopened its case." The defendant had no evidence to put on and thus the court's denial of the defendant's motion (Tr. 301) was based solely on the evidence presented by the government, which plainly was sufficient to sustain a guilty verdict. Thus, the fact that the court technically did not deny the motion until after the defense had rested clearly was not prejudicial. See, *e.g.*, *United States* v. *Conway*, 632 F.2d 641, 643 (5th Cir. 1980); *United States* v. *Dreitzler*, 577 F.2d 539, 552 (9th Cir. 1978), cert. denied, 440 U.S. 921 (1979); *United States* v. *Austin*, 462 F.2d 724, 737 (10th Cir.), cert. denied, 409 U.S. 1048 (1972).

The decision to permit the government to reopen its case to correct its failure to ask its witness to make an in-court identification of the defendant was within the court's discretion. Since the additional evidence in no way surprised petitioner, the court's ruling cannot fairly be regarded as constituting an abuse of discretion. See *United States* v. *Cordero*, 668 F.2d 32, 44 n.20 (1st Cir. 1981); *United States* v. *Hinderman*, 625 F.2d 994, 996 (10th Cir. 1980); *United States* v. *McDonough*, 603 F.2d 19, 22 (7th Cir. 1979); *United States* v. *Powers*, 572 F.2d 146, 152-153 & n.6 (8th Cir. 1978); *United States* v. *Sisack*, 527 F.2d 917, 919-920 (9th Cir. 1975). The fact that a motion for acquittal had been made did not remove the trial court's discretion to allow reopening of the government's case for the taking of

additional evidence. *United States* v. *Powers, supra*; *United States* v. *Dossey*, 558 F.2d 1336, 1338-1339 (8th Cir. 1977).[1]

Petitioner also argues (Pet. 21-23) that the court did not give him an adequate opportunity to present a defense after the government had rested its reopened case. The record refutes this allegation. Throughout the trial the court had been solicitous of petitioner's requests, even to the point of interrupting the proceedings before the jury for a belated hearing on the voluntariness of his statements. When the government reopened its case, it called one witness to the stand. After that witness had completed his brief testimony the court asked the parties whether they had "anything further" to present (Tr. 246). Government counsel expressly remarked that she had nothing else; defense counsel made no statement on the record. The court then directed government counsel to proceed with her closing argument (Tr. 246).

Petitioner had ample opportunity to present a defense if he truly had intended to do so. There is no reason to suppose that the district court would have denied him the opportunity to put on evidence if he had indicated such a desire. In fact, petitioner had already disclosed his intent to rest without calling any witnesses, prior to the reopening of the government's case (Tr. 243). After the lone witness had testified in the reopened case, petitioner gave no indication

---

[1]In any event, petitioner was not entitled to a judgment of acquittal at the time he made his motion. Evidence introduced by the government prior to the reopening of its case, including references to the "defendant" and to petitioner by name, testimony comparing the photograph on the passport application with his in-court appearance, and testimony identifying his handwriting and fingerprints on the application, was sufficient to sustain a guilty verdict. See Tr. 41, 44, 84-93, 164-172, 179-182, 214-222; *United States* v. *Vahalik*, 606 F.2d 99, 100 (5th Cir. 1979), cert. denied, 444 U.S. 1081 (1980).

that his intent had changed. Instead, he remained silent while the government proceeded with closing argument, and thereafter he followed with his own closing statements. Thus, the court of appeals correctly concluded (Pet. App. B, 6) that petitioner cannot now claim that he was denied an opportunity to present a defense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

VICTOR D. STONE
Attorney

NOVEMBER 1982

DOJ-1982-11